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[ORIGINAL CIVIL JURISDICTION]
WHITLEY, J.
December 3, 1934.
[APPELLATE JURISDICTION]
HUGGARD, C. J., THOMAS, C. J. (F.M.S.) and BURTON, J.
April 9, 1935.

LOKE WAN YAT.

v.

CHEAH LEAN GUAN.

[PENANG ORIGINATING SUMMONS No. 47 of 1935]
[PENANG CIVIL APPEAL No. 1 of 1935]

Trustee—Mortgage by—Liability of other settled property for any deficiency in security.

When a trustee properly mortgages settled property, the mortgagee is entitled to claim against the other assets of the trust for any deficiency remaining after deducting the proceeds of sale of the mortgaged properties.

Special Case.

Hogan for Plaintiff.

Ong Huck Lim for Defendant.

The facts and arguments are fully set out in the Judgments.

Cur. Ad. Vult.

WHITLEY, J.—This was a special case stated for the opinion of the Court under section 374 of the Civil Procedure Code pursuant to an order of Court dated the 12th October, 1934.

The facts stated in the special case are shortly as follows:—

By an Order of Court dated the 13th April 1923 made in Originating Summons No. 200 of 1923 the Court sanctioned the mortgage by Cheah Lean Guan (the present Defendant) as trustee of certain properties forming part of the estate of Cheah Choon Seng deceased. Cheah Lean Guan was then and still is the sole trustee of that estate. In pursuance of this Order, the Defendant as such trustee on the 8th May 1923 duly executed a mortgage of these properties. As a result of two Deeds of Transfer of Mortgage dated respectively the 10th May, 1924 and 11th December, 1925 the Plaintiff acquired the benefit of the mortgage and of all powers rights remedies and securities in the mortgage.

On the 13th April, 1934, the Plaintiff commenced this action by Originating Summons and on the 30th April 1934, he obtained the usual order for an account to be taken of principal and interest due under the mortgage and in default of payment a sale by auction with liberty for the Plaintiff to bid. The Defendant as such trustee made default in payment and the question stated for the opinion of the Court is whether the Plaintiff is in law entitled to claim against the other assets of the estate for any deficiency after the sale and or for money lent to the estate after deducting the proceeds of the sale.

The Defendant does not attack the mortgage or the subsequent Deeds of Transfer nor does he suggest that the moneys raised were not required and used for the benefit of the estate. It is accordingly unnecessary to consider the circumstances which led up to the necessity for seeking permission to mortgage these properties. The sole point which he raises is that inasmuch as the order of the 15th April 1923 merely sanctioned the mortgage of certain specified properties belonging to the estate the mortgagee's only remedy is against those properties and that if those properties realise less than the amount due under the mortgage the mortgagee has no right to claim for the deficit against the estate and can only claim such deficit from the trustee personally. Mr. Huck Lim for the Defendant relied upon the cases of *Farhall* v. *Farhall* L.R. 7 Ch. Appeal Cases 123 and *Watling* v. *Lewis*, (1911) 1 Ch.D. 414 as showing that in such a case any judgment against an executor or trustee must be *de bonis propriis* and not *de bonis testatoris*. The former case however is clearly distinguishable. It merely established that if an executor enters into some unauthorised contract he renders himself personally liable and cannot involve the deceased's estate in some new burdensome and unauthorised obligation. In the present case the mortgage was authorised by the Court. The decision in *Watling* v. *Lewis* wou'd appear to establish that where in a mortgage by trustees the trustees enter into a covenant for repayment with a proviso that the trustees shall not be personally liable this proviso would be void for repugnancy so as to make the trustees personally liable on the covenant. In the mortgage under consideration there is admittedly a covenant to repay. It is incorporated in the statutory mortgage by section 31 (2) of the Conveyancing and Law of Property Ordinance and it is also implied by the proviso that upon default in payment of interest the principal sum "shall be deemed to be due and payable on the 8th June 1923." In the Deed of Transfer of 10th May 1924 there is an express covenant to repay and by the subsequent transfer to the Plaintiff he acquires the benefit of all the powers rights and remedies expressly or impliedly conferred upon the mortgagees. Although the mortgage is expressed to be executed by the Defendant as trustee there is no proviso that he shall not be personally liable and to that extent. Mr. Huck

Lim argued the present case is stronger than that of *Watling* v. *Lewis* and the covenant to repay can only be a covenant by the trustee personally.

It seems to me, however, that the ruling of Warrington, J. in *Watling* v. *Lewis* must be taken to be applicable only to the facts of that particular case which was one in which trustees were seeking to evade personal liability and, moreover, even when so restricted, that case must be regarded as being of doubtful authority inasmuch as the decision of the same judge on a similar point in *re Robinson's Settlement*, (1912) 1 Ch. 717, was virtually overruled by the Court of Appeal, it being pointed out that the judge had followed his own decision in the earlier case in which two leading cases on this point, which I shall refer to later, had not been cited. *In re Robinson* turned also upon other questions but Buckley, L. J. in his judgment dealt specifically with this point and held that such a covenant by trustees as trustees does not bind the trustees personally.

In the case of *Gordon* v. *Campbell*, 1 Bell's App. 428 trustees borrowed money for the purposes of their trust from Colonel Gordon and granted an heritable bond over the trust property to secure the loan; they also bound themselves "as trustees aforesaid" to make repayment of the loan; and in the clause of warrandice of the land they bound themselves "qua trustees only" to warrant at all hands and against all mortals. This case was considered by Lord Cairns, L. C. in his judgment in *Muir* v. *City of Glasgow Bank*, L.R. 4 A.C. at page 361 where he observed that "It was perfectly competent for Colonel Gordon and these trustees to make any contract they pleased. Colonel Gordon might have insisted that they should be personally liable to him, or he might have agreed that they should only be liable as trustees, i.e., to the extent of their trust funds. They professed in one part of the instrument to contract 'as trustees' in another 'as trustees only;' and it was obvious that they meant in both places to contract in the same way. Further, if these words 'as trustees' and 'as trustees only' were not introduced to limit liability, there was no other purpose in the deed which they could possibly serve. They were absolutely unmeaning if they did not mean that the trustees were not contracting as individuals. Under these circumstances, the Court of Session, and afterwards this House (The House of Lords) held that there was no personal liability created against the trustees beyond their possession of the trust funds."

The present case is not one in which the trustee is seeking to avoid personal liability. It is the reverse. He is seeking to relieve the estate of liability and it seems to me that it must be considered in the light of the general principles so lucidly stated by Lord Cairns in the opening passages of the judgment to which I have just referred.—"Whether, in any particular case, the contract of an executor is one which binds himself personally or is to be satisfied only out of the estate of which he is the representative, is, as it seems to me, a question of construction, to be decided with reference to all the circumstances of the case; the nature of the contract; the subject matter on which it is to operate, and the capacity and duty of the parties to make the contract in one form or in the other. I know of no reason why an executor, either under English or Scotch Law, entering into a contract for payment of money with a person who is free to make the contract in any form he pleases, should not stipulate by apt words that he will make the payment, not personally, but out of the assets of the Testator. If for example, A.B., the executor of X., contracted to make a payment as executor of X., and as executor only, to C.D., it would be difficult to suppose that any obligation except an obligation to pay out of assets was intended. C.D. in the case supposed would have had authority to accept a contract so limited, and the words used could have no meaning, and could be referred to no object other than that of limiting responsibility." —"But the first question, whether in Scotland or England, must be What is the contract into which the parties have entered? and that must be accompanied by another question, What is the contract into which the parties were competent to enter? For if words have been used of any ambiguity, or the object of which may be open to any doubt, the construction must, according to the well-known rules of law, be given which will make the contract a legitimate and valid one, and not that construction by which the contract will be destroyed."

Applying these principles to the present case I think that the estate must be liable. It is true that the word "as trustee only" or "as trustee and not otherwise" do not appear in the mortgage or the deeds of transfer but it seems abundantly clear from the wording that it was understood by all the parties that it was the estate which was borrowing for the purposes of the estate and that the intention of all was that the mortgagee's remedies should be against the estate. The application to the Court for leave to mortgage was referred to him as such. The mortgage recites that the Court had sanctioned the "mortgage by the mortgagor as such trustee as aforesaid" and

clause 4 thereof provides that the expression "Mortgagor" shall include the Defendant and the trustee or trustees for the time being of the estate of the deceased. The first Deed of Transfer described the Defendant as "trustee of the Estate of Cheah Choon Seng deceased hereinafter called the Mortgagor."

The subject matter upon which the contract was to operate was the estate and the capacity and duty of the Defendant was to make that contract as representative of that estate; the Order of Court made him competent so to do. In my opinion it was clearly contemplated by all parties that in the event of it becoming necessary to enforce the covenant to repay it would be enforceable against the assets of the estate which had had the benefit of the mortgage. My answer to the question asked in the Special Case is accordingly that the Plaintiff is entitled to claim against the other assets of the Estate for any deficiency after sale.

Judgment Accordingly.

Solicitors for Plaintiff—*Hogan, Adams & Allan.*

Solicitors for Defendant—*Huck Lim & Hock Soo.*

The Defendant appealed from the above Judgment. The appeal came on for hearing on the 1st and 4th March, 1935 at the Penang Court of Appeal coram Sir Walter Huggard, C.J., Sir Samuel Thomas, C.J., F.M.S., and Burton, J.

B. E. Ross & Ong Huck Lim for appellant (Defendant).

Hogan for respondent (Plaintiff).

HUGGARD, C.J.—This is an appeal by the Defendant from the decision of Whitley, J. on a Special Case stated for the opinion of the Court under section 374 of the Civil Procedure Code.

The facts and circumstances relevant to the consideration of the question at issue in this matter are as follows.

One Cheah Choon Seng (to whom I shall refer as "the deceased") died on the 4th February, 1916, having by his last will appointed one Cheah Hee Nyan his sole executor and trustee of his Will.

On the 12th July, 1921, Cheah Hee Nyan mortgaged four pieces of his property to the Eastern Shipping Co., Ltd. to secure the principal sum of $65,000 with interest thereon at the rate of $1.50 per cent per month.

In December, 1921, Cheah Hee Nyan, acting under the powers conferred upon him by the codicil to the will of the deceased, appointed the Appellant to be a trustee of the will jointly with himself, and in September, 1922, Cheah Hee Nyan retired from the trusteeship leaving the Appellant as sole trustee.

Prior to his retirement from his trusteeship, however, Cheah Hee Nyan had become indebted to the estate, and in part satisfaction of his indebtedness he, on the 2nd November, 1922, transferred to the Appellant as trustee the fee simple of the four properties mortgaged to the Eastern Shipping Co., but subject to the mortgage. The position therefore was that the estate of the deceased became the owner of these four properties subject to paying off the mortgage of $65,000 with interest at $1.50 per cent per month.

On the 25th November, 1922, the Eastern Shipping Co. transferred the benefit of the mortgage to one Lim Chuan Guan, and in the following year the transferee called upon the Appellant as trustee to repay the principal and interest due on the mortgage.

As, apparently, the estate was not in a position to put up the money the Appellant endeavoured to obtain the amount required from other sources, and he came to a provisional arrangement with three gentlemen named Tan Lo Heong, Ng Ung Eng and Ng Seng Sooi under which they agreed to take over the mortgage at a reduced rate of interest, namely, $1.10 per cent per month, provided that a fifth piece of property belonging to the estate of the deceased was included by way of additional security.

This arrangement was necessarily provisional as under the will of the deceased the trustee had no power to mortgage. It was necessary, therefore, for the Appellant to obtain the sanction of the Court to the proposed mortgage. The Appellant accordingly applied to the Court, and on the 13th April, 1923, Sproule, J. made an order sanctioning the mortgage.

In pursuance of this order the five properties referred to were, on the 8th day of May 1923, mortgaged to Tan Lo Heong, Ng Ung Eng and Ng Seng Sooi, the Appellant having first paid off the existing mortgagee, Lim Chuan Guan, and obtained from him a reconveyance of the mortgaged properties.

As a result of subsequent transfers the Respondent here has become entitled to the balance which still remains due and owing on the mortgage of the 8th May, 1923, and in April, 1934, he obtained an order of Court for an account to be taken of the principal and interest due under the the mortgage, and, in default of payment, for the sale of the mortgaged properties by public auction.

The Appellant as trustee made default in payment of the amount found by the Registrar to be due to the Respondent under the mortgage,

and the question then arose whether the Respondent is entitled to claim against the other assets of the deceased for any deficiency remaining after deducting the proceeds of sale of the mortgaged properties, or whether he could only claim against the Appellant personally.

This question was submitted for the opinion of the Court under Section 374 of the Civil Procedure Code, and on the 3rd December 1934, Whitley, J. held that the Respondent is entitled to claim against the other assets of the estate for any deficiency after sale. It is from that decision that this appeal has arisen.

This case presents one unusual feature, in that the Appellant is not (as is usual in such cases) seeking to be relieved of personal liability; on the contrary he is seeking to assume it and to relieve the estate. His contention is that in the event of a deficiency the Respondent has no claim against the other assets of the deceased's estate, and that his only remedy is against the Appellant personally.

In order to arrive at a decision on this contention it is necessary to consider in the first instance whether under the Order of the Court of the 13th April, 1923, which is mentioned above, the Appellant was empowered to enter into a mortgage which, in the event of a deficiency, would bind the other assets of the deceased. On behalf of the Appellant it is argued that the order of Court sanctioned nothing more than a mortgage of the properties specifically mentioned in the order and that therefore the mortgagee is only entitled to go against those assets. It is true, of course, that the Order of Court merely sanctioned the mortgage of certain specified properties forming part of the deceased's estate, but it appears to me that what we are concerned with here is the intention of the Court in making that Order. Did the Court contemplate that, in the event of a deficiency, the liability therefore would attach to the other assets of the estate or to the trustee personally? In attempting to answer this question one must, I think, take into consideration the surrounding circumstances. In the Appellant's affidavit of the 5th April, 1935, which was filed in support of his application for leave to mortgage, he set out clearly the whole position as it affected the estate. In that affidavit it is stated :—

(1) that the Appellant was the sole trustee of the estate of the deceased;
(2) that the late trustee had transferred to the estate, in part satisfaction of his indebtedness, certain properties subject to a mortgage upon them;
(3) that the mortgagee had called upon the Appellant as trustee to repay the amount due on the mortgage;
(4) that one Ng Seng Sooi had agreed to take a transfer of the mortgage at a lower rate of interest provided a further piece of property was added as additional security.

On these facts Sproule, J. sanctioned the mortgage of all five properties by the Appellant, who is described in the order as the sole trustee of the estate of the deceased. It seems to me that in making this order Sproule, J. must necessarily have been satisfied that it was for the benefit of the estate that this mortgage should be entered into—as in fact it clearly was, owing to the proposed reduction in the rate of interest. The position therefore was that the learned Judge authorised the Appellant in his capacity as trustee to enter into a mortgage, the sole object of which was to benefit and protect the estate. In these circumstances I think it is a necessary inference that the intention of the learned Judge was that any liability arising out of the mortgage should attach to the estate and not to the trustee personally. If it had been the intention that the liability of the estate should be limited to the actual properties mortgaged, then in my opinion it is reasonable to expect that, in the circumstances, the order would have expressly so stated. In the absence of any such expression of intention it must, in my view, be assumed that the learned Judge, in making his order, contemplated that the Appellant in his capacity as trustee would enter into the ordinary form of mortgage which would create a first charge on the properties mentioned therein but would also contain, expressly or by implication, a covenant binding on the general estate to repay the principal and interest. It appears to me, therefore, that the Court, in sanctioning this mortgage for the benefit and protection of the estate, must be deemed to have authorised the repayment of the amount due out of the general estate.

I am accordingly of opinion that under the order of Court of the 13th April, 1923, the Appellant was competent to enter into a mortgage which, in the event of a deficiency, would bind the other assets of the deceased.

It is necessary now to turn to the mortgage of the 8th May, 1923, which was entered into in pursuance of the order of Court referred to above, and to consider the question whether under the terms of that mortgage the other assets of the deceased are liable in the event of a deficiency.

The answer to this question depends on the construction to be placed upon the mortgage itself.

An examination of that document shows that it was entered into between "Cheah Lean Guan ..... trustee of the estate of Cheah Choon

Seng deceased (hereinafter called 'the Mortgagor')." The deed then goes on to recite the circumstances of the Appellant's appointment as trustee and the order of Court of the 13th April, 1923, sanctioning the mortgage. By Clause 1 of the deed the Mortgagor "as trustee of the estate of the said Cheah Choon Seng deceased" conveys the property to the Mortgagees. In Clause 2 there is an implied covenant on the part of the Mortgagor (i.e. the trustee) for repayment of the principal and interest. And finally Clause 4 provides that:—

> "In these presents where the context so admits the expression 'the Mortgagor' shall include the said Cheah Lean Guan and the trustee or trustees for the time being of the estate of the said Cheah Choon Seng deceased."

In my view it is clear from the language used in this mortgage that the Appellant entered into it in his capacity as trustee, and I am of opinion that the mortgage binds the general estate of the deceased.

Mr. Ross for the Appellant argued that because the mortgage did not expressly state that the trustee was contracting as trustee only and not otherwise, the personal liability of the trustee had not been excluded and therefore no liability could attach to the estate. But the question here is not whether the personal liability of the trustee was excluded but whether under the terms of the mortgage the mortgagee has a right to claim against the general estate. It does not follow that because the trustee may have failed to exclude his personal liability there can be no liability attaching to the estate.

In support of his argument that the Appellant personally, and not the estate of the deceased, is liable in the event of a deficiency, Mr. Ross relied strongly on the decision in *Farhall* v. *Farhall*, (L.R. 7 Ch. Appeal Cases, 123). In that case the executrix of a testator kept an executorship account with a bank, and having power, under the will, to mortgage the real estate in aid of the personalty, she deposited with the Bank the title deeds of part of the testator's real estate as security for the balance. The account was considerably overdrawn, and the security proved insufficient to pay the balance. A decree for administration of the testator's estate having been made, the bank claimed to prove as creditors for the balance due. It was held that the bank was not entitled to prove, and that a person could not, by contract with an executor, acquire a right to prove as a creditor against the estate, though an executor had power to give him a lien on specific assets. But it is clear from the judgment of Sir W. M. James, L.J. that the decision in that case was based on the fact that there was no debt due from the estate to the Bank, but only a debt due by the executrix. As James, L.J. said at page 126:—

> "The contract is with the executrix; there is no loan to the estate; there is no credit given to the estate; the credit is given only to the person who borrows, though the money may be borrowed for the purposes of the estate."

This case and the case of *Watling* v. *Lewis*, (1911) 1 Ch. 414 which was also relied on appear to me merely to establish that the mere fact that a trustee or executor enters into a contract as trustee or executor, as the case may be, is not of itself sufficient to bind the estate in respect of that contract. There must be a sufficiently clear indication of intention (coupled of course with the necessary power) to bind the estate before the estate can be made liable. In the present case I am of opinion that the necessary power to bind the estate was conferred by the order of Court of the 13th April, 1923, and that the intention to bind the estate was adequately indicated in the mortgage of the 8th May, 1923.

The cases of :—

Owen v. *Delamere*, 15 Eq., 134;
In re Morgan, 18 Ch. D., 93;
In re Evans, 34 Ch. D., 597;
In re Johnson, 15 Ch. D., 548.

were also cited by Mr. Ross. These were cases where the business of a deceased was carried on by his executors, and in each case it was held that creditors could only sue the executors personally and could not successfully maintain an action against the general estate. But those cases appear to me to be distinguishable from the present case because in none of them could a debt be shown to be due by the general estate. The creditors had no right to go beyond the assets devoted to the business.

From a consideration of all the authorities it is, I think, clear that every case such as this must be decided upon its own facts and circumstances. As Lord Cairns, L.C. said in *Muir* v. *City of Glasgow Bank*, 4 App. Cases, 337 (at page 355) :—

> "Whether, in any particular case, the contract of an executor or trustee is one which binds himself personally, or is to be satisfied only out of the estate of which he is the representative, is, as it seems to me, a question of construction, to be decided with reference to all the circumstances of the case; the nature of the contract; the subject matter on which it is to operate, and the capacity and duty of

the parties to make the contract in the one form or in the other."

Applying these principles to the present case, when I look at the terms of the mortgage of the 8th May, 1923, and bear in mind the circumstances in which it was entered into, I have no hesitation in holding that its effect is to render the general estate liable in the event of a deficiency.

For these reasons I think that the decision of Whitley, J. was right and that this appeal should be dismissed with costs.

The amount deposited in Court as security for the costs of this appeal may be paid out in such manner as may be agreed to by the parties concerned.

THOMAS C.J., (F.M.S.)—The question raised by this appeal is whether the contract of a trustee contained in a mortgage of estate properties is one which binds him personally or is to be satisfied out of the other assets of the estate.

The question was submitted in the first place to Whitley, J. by way of a special case in which the transferee of the mortgage was the plaintiff and the trustee was the respondent. The learned Judge decided that the contract should be satisfied out of the other assets of the estate, and in pursuance of the provisions contained in the special case, judgment was entered for the plaintiff. From that judgment the defendant now appeals.

The estate concerned is that of Cheah Choon Seng who died on the 4th of February 1916. By his last will he appointed Cheah Hee Nyan, his nephew and adopted son, to be his sole executor and trustee. Probate was granted to Cheah Hee Nyan on the 8th of November, 1916. Although the will contained no express power to mortgage, there were very wide powers of investment. These are contained in clause 19, which declares that the moneys directed to be invested by the Will shall be invested in such manner and in such investment and securities as the trustee shall in his absolute discretion think fit whether such investment shall be authorised by law for the investment of trust moneys or not.

In a codicil to the will the testator stated:—

> "I am desirous of emphasising my wish that my said son Hee Nyan shall have full and absolute control on my estate after my death free from interference by any person whatsoever."

In this codicil a power is given to Hee Nyan to appoint one or more trustees to act jointly or independently of himself and to confer on such trustee or trustees such power or powers in relation to the estate as he shall in his absolute discretion think fit.

On the 23rd of December, 1921 Cheah Hee Nyan appointed Cheah Lean Guan (the present appellant) to be a trustee with him; and on the 11th of September, 1922 Cheah Hee Nyan retired from the trusteeship, and conferred on Cheah Lean Guan all the powers conferred on him by the will and codicil of Cheah Choon Seng.

Cheah Hee Nyan was indebted to the estate of Cheah Choon Seng, and in part satisfaction of that indebtedness he transferred the fee simple of certain lands which were then subject to a statutory mortgage for the sum of $65,000 and interest at $1.50 per cent per mensem to the Eastern Shipping Company Limited, dated 12th July, 1921. The indenture by which this transfer was carried out does not appear to have been included in the record of the proceedings. In the Indenture of the 7th of May, 1923, however, appears the following recitals:—

> "And whereas by an indenture dated the 22nd day of November, 1922 the said Cheah Hee Nyan for the consideration therein named conveyed unto the trustee the said lands and hereditaments in fee simple, as part of the estate of the said Cheah Choon Seng deceased, but subject to the said indenture of the 12th day of July 1921 and to the payment of the principal sum and interest thereby secured."

After this conveyance had been made, the mortgagee called upon the trustee to repay the principal and interest due on the mortgage. Then the trustee found Tan Lo Heong and two others who were prepared to take a transfer of the mortgage at a lower rate of interest provided another property was added by way of further security. The trustee was prepared to add another property, and proceeded to apply for the sanction of the Court.

An application supported by affidavits was accordingly made. This was approved. The order of the Court dated the 13th of April 1923 contained the following words :—

> "....upon reading the several affidavits of .... It is ordered that the Court doth sanction the mortgage by the said Cheah Lean Guan of the properties forming part of the estate of Cheah Choon Seng deceased."

The proposed indenture of mortgage was executed on the 8th of May 1923. Therein Cheah Lean Guan was described as the trustee of the estate of Cheah Choon Seng and called the mortgagor. The indenture recited the appointment of the mortgagor as trustee and also the powers of investment conferred under the will of Cheah Choon Seng. It was stated that

"the mortgagor in pursuance of the hereinbefore recited order of Court and of all other powers him hereunto enabling hereby as trustee of the estate of the said Cheah Choon Seng deceased conveys."

In clause 4 it was stated that

"Where the context so admits the expression the mortgagor shall include the said Cheah Lean Guan and the trustee or trustees for the time being of the estate of the said Cheah Choon Seng deceased."

I have omitted to set out the various dealings as to the mortgage. It is sufficient to say that the Eastern Shipping Company Limited transferred to Lim Chin Guan (25th of November 1922), and Lim Chin Guan reconveyed to Cheah Lean Guan on the 7th of May 1923, and on the following day viz. the 8th of May 1923 the mortgage sanctioned by the Court was executed by Cheah Lean Guan in favour of Tan Lo Heong, Ng Ung Eng and Ng Seng Sooi. On the 10th of May, 1924 the mortgage principal was reduced by the sum of $5,000 and on the same day Tan Lo Heong, Ng Ung Eng and Ng Seng Sooi transferred the mortgage to Cheong Yuk Choy, Liew Weng Chee, Choo Kia Peng and Alan Loke. Cheah Lean Guan was a party to this transfer.

On the 11th of December 1925 the mortgage was transferred to Loke Wan Yat. This indenture appears to have been signed by Cheong Yuk Choy and Liew Weng Chee only no objection has been taken on this account, and it is possible that this is an error in the record of proceedings.

I have already referred to the indenture of the 8th of May 1923. The indenture of the 10th of May 1924 is expressed to be supplemental to the indenture of the 8th of May 1923. Thereby the mortgagor covenanted to repay the principal with interest at the reduced rate of 9 per cent per annum, and the mortgagee conveyed as beneficial owner. Subsequent to the order of the Court dated the 13th of April 1923 no fresh application was made to the Court.

Such was the series of transactions. Before going further it may be of interest to mention that it was stated in the course of the argument that whereas the trustee Cheah Lean Guan is not in a financially sound position, the assets of the estate would be fully able to meet any deficiency on the sale of the mortgaged properties.

Speaking generally an executor possesses strictly limited powers to mortgage, even when such powers are not conferred upon him. When such powers are conferred upon him it is almost needless to say that he must strictly comply with them; and so also a trustee may have powers conferred upon him by the instrument creating the trust. Even when powers have been conferred upon an executor, not every borrowing is chargeable to the estate. So in the case of *Farhall* v. *Farhall*, (1871) 7 Ch. A.C. page 123 Sir W. M. James, L. J. said in the course of his judgment:—

"But to say that the executrix can, by borrowing money, enable the person who has lent to stand as a creditor upon the estate, is a position supported by no authority and no principle. The contract is with the executrix; there is no loan to the estate, there is no credit given to the estate; the credit is given only to the persons who borrow, though the money may be borrowed for the purposes of the estate."

In that case although the executrix had a power to mortgage, she had only created a lien by the deposit of securities and no mortgage deed had been executed. It does not go so far as to say that under no circumstances can an executor enter into a written contract so as to bind the assets of the estate.

In the case of *Muir* v. *City of Glasgow Bank*, 4 A.C. page 337 Lord Cairns said in his judgment:—

"I know of no reason why an executor, either under English or Scotch law, entering into a contract for payment of money with a person who is free to make the contract in any form he pleases, should not stipulate by apt words that he will make the payment, not personally, but out of the assets of the estate. If, for example, A.B. the executor of X contracted to make a payment as executor of X, and as executor only, to C.D., it would be difficult to suppose that any obligation except an obligation to pay out of assets was intended."

In the 7th edition of *Fisher and Lightwood's* Law of Mortgages at page 172, there is a note to the effect that trustees should covenant to pay only out of the trust funds so far as sufficient, and in the Encyclopaedia of Forms & Precedents, 2nd edition, vol. 10, page 89, there is a note that

"Some care is required in framing 'limited liability' covenants by trustees, for if the limitation of liability is too widely or vaguely expressed, either the covenant or the limitation may be ineffective, the result in the former case being that the trustees are not liable at all, and in the latter case that they are personally liable without any limitation."

It therefore appears clearly that a trustee can enter into a written contract by which the

available assets of the fund can be made responsible, and any personal liability of the trustee may be excluded. And it would also appear that for the purposes of construing the document, the whole of the surrounding circumstances may be referred to (see *Muir* v. *City of Glasgow Bank*). It is for the reason of having the surrounding circumstances in the present case that I have set out the facts at some length.

These facts show that the widest powers of investment were conferred on the trustee. He was given an absolute discretion to invest, whether such investment was authorised by law or not. Although usually an investment in an equity of redemption would not be authorised (see *Norman* v. *Norman*, 43 C.D. 206) there was nothing to prevent such an investment being made. Moreover, the investment was not one of choice; it was rather one of compulsion. For the retiring trustee was indebted to the estate, and this investment was acquired in reduction of that indebtedness. Presumably the investment at the time was considered to be of some value. Even if it had no value, there was, in view of the trustee's absolute discretion, nothing to prevent its being made apart from any suggestion of fraud.

The investment was made on behalf of the estate and in the interest of the estate. There was no actual borrowing by the trustee. The investment was subject to borrowings of another person. The conveyance specifically stated that the lands were to become part of the estate of Cheah Choon Seng.

The deed of conveyance is not before the Court, but the recital in the indenture of the 7th of May, 1923 would indicate that the intention was that the liability in respect of the mortgage as well as the land itself should be transferred to the estate, and there is nothing to indicate any intention that the trustee should be personally liable.

Thereafter it was necessary either to pay off the mortgages or to enter into a fresh mortgage. For the latter purpose a property has to be added, and an application was made to the Court. If it was the intention that the trustee should be alone personally liable, then there would seem to have been little use in seeking the assistance of the Court. The Court having sanctioned the transaction the indenture of the 8th of May 1923 was executed. It is stated to be

> "between Cheah Lean Guan of No. 82a Penang Street, Penang, trustee of the estate of Cheah Choon Seng deceased (hereinafter called the mortgagor)"

The powers of the trustee to invest are recited and also the sanction of the Court. In clause 1 it is stated that the

> "mortgagor in pursuance of the hereinbefore recited order of Court and of all other powers him thereunto enabling hereby as trustee of the estate of the said Cheah Choon Seng conveys...".

In some circumstances the words 'as trustee' might be considered to be ambiguous. But in this indenture the use of the words 'as trustee' in connection with the powers of the trustee and the sanction of the Court indicate quite plainly that the trustee is not acting in his personal capacity but on behalf of the estate so as to render not himself but the estate liable. Of course still more precise language might have been employed since some improvement is nearly always possible. However, the words are, in my opinion, sufficient to manifest the intention of the parties. That intention is emphasized when the surrounding circumstances are considered.

I now come to the indenture of the 10th of May 1924. This was stated to be supplemental to the indenture of the 8th of May, 1923. This may have had the effect of adding a personal liability on the part of the trustee. Such an addition would not necessarily conflict with or avoid the liability already imposed upon the estate. It is distinguishable from such a case as *Watling* v. *Lewis*, 1 Ch.D. page 414. The position in the present case is entirely different. No attempt has been made to render the trustee liable. It is the trustee who, contrary to the usual state of affairs, seeks to have the liability thrust upon him. It may be that he is also liable. That, however, is not the real question before the Court. The real question is whether the estate is liable.

In view of the words contained in the indenture of the 8th of May 1923 and of all the surrounding circumstances I am satisfied that the estate is liable. In my opinion, therefore, the judgment of Whitley, J. should be upheld and the appeal should be dismissed with costs.

BURTON, J.—The sole point for determination in this appeal is whether Whitley, J. was right in holding that the general assets of the estate of Cheah Choon Seng deceased are liable for any deficiency that may arise after the sale by auction of the properties mortgaged under the sanction of the order of Sproule, J., of the 13th April 1923.

The estate became indebted under somewhat peculiar circumstances. In his will dated 21st March, 1912, the late Cheah Choon Seng appointed Cheah Hee Nyan, his adopted son, the sole executor and trustee of his will. Cheah Choon Seng died on 4th February, 1916, and his will was admitted to Probate in Singapore in 1916. On 23rd December, 1921 Cheah Hee Nyan appointed Cheah Lean Guan, the appellant,

to be trustee of the will jointly with him, and on 11th September, 1922, Cheah Hee Nyan retired from the trusteeship, leaving Cheah Lean Guan the sole trustee.

Cheah Hee Nyan in his own right was entitled to four pieces of land which he had mortgaged to the Eastern Shipping Company for $65,000, but being himself indebted to the estate of Cheah Choon Seng he transferred in part payment of the debt the equity of redemption of this mortgage.

On 25th November, 1922, the mortgage was transferred to Lim Chin Guan.

The position now is that Cheah Hee Nyan owed the Eastern Shipping Company $65,000, and that four pieces of land belonging to the estate of Cheah Choon Seng were under mortgage to secure it. There is no doubt that at this period the estate was only liable to the extent of the four pieces of land. The debt was Cheah Hee Nyan's and there was no covenant to pay by the estate of Cheah Choon Seng.

On 13th April, 1923, Cheah Lean Guan obtained an order from Sproule, J. which sanctioned the mortgage by Cheah Lean Guan of five pieces of land forming part of the estate of Cheah Choon Seng deceased.

In pursuance of this order of Court Cheah Lean Guan on 10th May, 1923 mortgaged the five pieces of land to Tan Lo Heng, Ng Leng Eng and Ng Seng Sooi. There is an implied covenant to repay in this mortgage.

There is no power in the will to mortgage, and the power to mortgage these five pieces of land derives solely from the order of Court. It is therefore necessary in the first place to consider whether this order gave authority to bind the estate to pay any deficiency. In *Muir* v. *the City of Glasgow Bank*, 4 App. Cases at p. 355, Lord Cairns said:

> "Whether in any particular case, the contract of an executor or trustee is one which binds himself personally, or is to be satisfied only out of the estate of which he is the representative, is, as it seems to me, a question of construction, to be decided with reference to all the circumstances of the case; the nature of the contract; the subject-matter on which it is to operate, and the capacity and the duty of the parties to make the contract in the one form or the other."

I think it is extremely unlikely that the possibility of the land being sold for less than the mortgage debt was very seriously considered at the time; Sproule, J. had before him a valuation (which is not before us), but it is obvious that that valuation must have shown that the value of the land was in excess of the money due on the mortgage; otherwise it would have been prudent in the interests of the estate to allow the four pieces of land to be sold there and then, rather than throw a fifth piece of land into the mortgage. Moreover when the estate of Cheah Choon Seng accepted the transfer of the equity of redemption it must have been worth something to the estate. It is clear that in making this order Sproule, J. intended the good of the estate.

The affidavit of Cheah Lean Guan in support of his application for sanction to mortgage in paragraph 8 says:

> "One Ng Seng Sooi has agreed to take a transfer of the said mortgage at the lower rate of interest of $1.10 for every hundred dollars per mensem provided I am willing to add another property by way of further security for the said mortgage debt."

I can see no particular difficulty in drawing a deed of transfer of the mortgage to Ng Seng Sooi and at the same time adding another piece of land as security; but that was not done, and Sproule, J. sanctioned not the Transfer of the mortgage, as suggested in the affidavit, which would have left the estate liable only to the extent of the property mortgaged and Cheah Hee Nyan still accountable for the whole debt, but

> "a mortgage by the said Cheah Lean Guan of properties forming part of the estate of Cheah Choon Seng deceased."

The effect of the order of Court therefore was to sanction a new contract in which Cheah Hee Nyan was not a party. Accordingly on 5th May, 1923, Lim Chin Guan re-conveyed all the four pieces of mortgaged land to the Trustee, which apparently relieved Cheah Hee Nyan of all further liabilities; and on 8th May, 1923, Cheah Lean Guan mortgaged the five pieces of land to Tan Lo Heong, Ng Ang Eng and Ng Seng Sooi for $65,000. But it is probable that things were said at the hearing of the summons before Sproule, J., of which the record is not before us, because the bargain sanctioned is materially different from the bargain sanctioned in the affidavit.

Now it is clear that generally a mortgage implies not only the giving of security but also a personal covenant to repay; "What is a mortgage?" says Plumer, V. C. in *Quarrell* v. *Backford*, 1 Madd. 278.

> "Everybody knows it consists of two things; it is a personal contract for a debt secured by an estate; and in equity the estate is no more than a Pledge or

> security for the debt; The debt is the principal; the estate is the accident."

and by his sanction to mortgage, Sproule, J. must have impliedly authorised a personal covenant to repay. He uses the word mortgage, not for example pledge. The reconveyance of the mortgaged properties by Lim Chin Guan immediately before the execution of the mortgage of the 8th May sufficed to clear Cheah Hee Nyan of liability; and this instrument was necessary if the mortgage was to be carried out in pursuance of the order of Court. The mortgage deed must contain a covenant to repay, and that covenant must be made by Cheah Lean Guan either personally or as trustee of the estate of Cheah Choon Seng. Moreover it is unreasonable to suppose that Sproule, J. intended that the estate of Cheah Choon Seng should not be bound to repay the principal. It was never Cheah Lean Guan's debt, and he was acting all the time in the interest of the estate; and if Sproule, J. had intended not to bind the estate, he could have approved the transfer proposed and left Cheah Hee Nyan bound. This suffices, I think, to distinguish *Farhall* v. *Farhall*, 7 Ch. App. 123, upon which Mr. Ross relied strongly, because here the trustee had the sanction of the Court to enter into the specific bargain which he afterwards made, whereas in *Farhall* v. *Farhall* the will gave the executor "a power to charge his real estate in aid of his personal estate." The two cases seem to me quite different.

Now the covenant to repay is not express but implied; and I think that this implied covenant must be deemed to be in consonance with the rest of the document and therefore as trustee.

Paragraph 4 of this document has caused me some difficulty; but I think the intention is to bind the estate though it does not necessarily of itself exclude the personal liability of Cheah Lean Guan.

The document of 10th May, 1924 which transfers the mortgage is drawn on the same lines as the mortgage of the 8th May, and is to be interpreted on the same principles.

The case of *Watling* v. *Lewis*, (1911) 1 Ch. 414, was pressed upon us as governing this case; but at p. 422, Warrington, J. says:—

> "On the other hand it was pointed out in *Williams* v. *Hathaway* that there is no objection in law to a proviso limiting the liability of the covenantor provided it really limited it without destroying it; if it really limits the liability either in point of time or by specifying the particular fund out of which alone the payment has to be made, that may be perfectly good."

and later he asks:

> "Which of the two cases is this? Do the words of this covenant purport to limit the liability of the defendants or destroy it altogether?"

But the argument of Warrington, J. appears to be that the words "but not so as to create any personal liability" destroy the personal covenant, while the words "as trustees" do not suffice to attach the liability to the trust estate. He holds that these words purport to destroy the liability altogether. But this is at best an interpretation of a specific document and the statement of Warrington, J., when he says:

> "Those words 'as such trustees' again, in my view, in a covenant of this kind, have no effect at all. A covenant by a person 'as trustee' does not render his trust estate liable, it is a covenant by himself."

are in direct contradiction to the words of Buckley, L.J. in *Robinson's Settlement*, (1912) 1 Ch. who says: at p.729;

> "This covenant as trustee was I think not a covenant which bound Stevens personally; it was a covenant which bound only the two trustees in respect of the trust fund in their hands at the date of the issue of the writ."

There is no intention in our case to destroy any liability, because I think that they suffice to attach liability to the estate, and it does not even follow that though Cheah Lean Guan has succeeded in attaching liability to the estate, he has succeeded in excluding his own personal liability.

I think therefore that the decision of Whitley, J. was right and I agree with the order proposed by the learned Chief Justice.

Appeal Dismissed.

Solicitors for Appellant (Defendant)—*Huck Lim & Hock Soo.*

Solicitors for Respondent (Plaintiff)—*Hogan, Adams & Allan.*

[APPELLATE CRIMINAL JURISDICTION]

BUCKNILL, C.J., EBDEN & SPROULE, JJ.

November 25, 1916.

H. NUNES v. SONG KEE CHUAN

[SINGAPORE MAGISTRATES APPEAL No. 36 of 1916]

Municipal Ordinance 1913, S. 226—Nuisance—Abatement—Closing order.

Under S. 226 of the Municipal Ordinance 1913 it is not open to a Municipality to order the removal of the inhabitants of a dwelling house as a means of abating a nuisance, when such nuisance is due solely to a faulty construction of the house which is irremediable.

When owing to structural defects a house dependent upon and connected with other houses of a similarly faulty character is regarded as unfit for human habita-